Held: (1) the onus is upon the plaintiff to prove that a woman can be a "karta"; (2) the plaintiff has not discharged this onus; (3) under section 131(1) of the Hindu Code, a woman cannot be a "karta".

APPLICATION TO AMEND WRIT OF SUMMONS

K. E. Hilborne for the plaintiff-applicant.

J. L. R. Pillai and *K. E. W. Hatchard* for the defendants.

Whitton, J. : — This is an application on the part of the plaintiff to amend the endorsement to the Writ of Summons in this action so that she may sue in the capacity of "karta" or the managing member of the Hindu Joint Family of P. P. V. P. L. The application was adjourned to Open Court for argument.

The application is opposed, broadly speaking, on two grounds; that a woman cannot be a "karta", and that the plaintiff has no status in the matter which entitles her to sue.

On the question of whether a woman can be a "karta" counsel have not been able to cite any conclusive statement from the authorities, nor have I been successful in discovering one myself, but it seems to me section 131 of The Hindu Code (*Gour* 4th Edition p. 442) goes far to support the view that a woman cannot be a "karta". This section reads :—

131. (1) Except in the case of a trading family, the father, and in his absence, the next senior male relation is the rightful manager of a co-parcenary;

(2) Provided that during the incapacity or absence of the manager or in case of emergency, any other co-parcener may with the express or implied consent of the co-parceners act for him.

It is not suggested this is a case of a trading family with regard to which, apparently, a female, who has inherited as a limited owner the estate of a deceased male owner, may be manager of a trade (*Gour* p. 471). Again it is quite settled that females cannot be co-parceners, and one would expect the fact to be mentioned in the text-books if there was ground for saying women could be "kartas" although they cannot be co-parceners. It is for the plaintiff to show she possesses the legal capacity in which she now seeks to carry on this action. In view of the absence of any positive authority that a woman can be a "karta", and of a good deal on the subject in the text-books which to my mind suggests the position can only be held by a male, I am unable to hold that the plaintiff has discharged this onus.

If I am correct in holding the plaintiff cannot be a "karta" that appears to be the end of the matter as it stands at the moment. I should perhaps state, however, that if the plaintiff was entitled to sue as "karta" it seems to me the other objections raised to this application would cease to have force. Once the standing of "karta" is established it appears clear that all members of the family are bound by his transactions as the family representative (*Mayne* on Hindu Law and Usage 11th Ed. p. 371). Again if this application was successful the capacity of the plaintiff would be clearly defined even though the form of her name on the plaint might still be open to the criticism Mr. Hatchard has levelled against it.

The application is dismissed with costs.

Appliction dismissed.

THE FIRM OF T. AR. CT.
v.
THE FIRM OF SN. S. AR. N.

[O.C.J. (Buhagiar, J.) June 1, 1953]

[Penang — Civil Suit No. 255 of 1951]

Limitation Ordinance, s. 3 — Practice and Procedure — Renewal of Writ of Summons after period of limitation — Defence of limitation must be pleaded — Period of limitation applicable to Thavanai letters.

This was an application to set aside an order for renewal of a Writ of Summons on the ground that the claim therein had become statute barred prior to the date of renewal. The claim was on a Thavanai letter which was payable on the 2nd October 1941. The writ was issued against the defendant on the 21st December 1951 and was not served until the 15th January 1953. A subsequent order for renewal and enlargement of time was obtained on the 6th February 1953 and this application is to set aside this order. The defendant submitted that the period of limitation begins to run from the date on which the Moratorium Proclamation 1949 came into force i.e. on 1st October 1949, and therefore under Article 41 or Article 42 of the Schedule to the Limitation Ordinance the plaintiff's claim became barred on the 2nd October 1952.

The two important points raised in this case were whether this Court **motu proprio** has power to dismiss a suit which is statute barred and secondly what is the period of limitation applicable to Thavanai letters.

Held: (1) under section 3 of the Limitation Ordinance, the Court is not bound of its own motion to look into the question of limitation; it is compelled to dismiss it if the claim is barred only if the defence of limitation is set up. The defendant in this case had no opportunity to set up that plea when the order for renewal was made but they have now done so in this application; (2) the Thavanai letter in this case should be treated as a deposit and the period of limitation should therefore be 3 years as laid down in Article 42 of the Schedule to the Ordinance.

Cases referred to :—

(1) *Holman v. George Elliot & Co. Ltd.* (1944) K.B. 591.

(2) *Battersby v. Anglo-American Oil Co. Ltd.* (1945) 1 K.B. 23.

(3) *Cheang Cheow Lean Neo v. Low Kim Pong* (1897), 5 S.S.L.R. 22 at p. 26.

(4) *Coombs v. Coombs* L.R. 1 P & M 288.

(5) *Rahman Chetty v. McIntyre & Ors.* (1879), 1 Ky. 476.

(6) *Letchumanan Chettiar v. Alagappa Chettiar* (1934) M.L.J. 50; (1934) S.S.L.R. 114.

(7) *Sockalingam Chettiar v. Palaniappa Chettiar* (1935) M.L.J. 74; (1935) S.S.L.R. 70.

SUMMONS-IN-CHAMBERS.

I. K. Meek for the plaintiff.

R. D. Hume for the defendant.

Buhagiar, J. : — This is an application by the defendant firm by way of Summons-in-Chambers for an Order that the Writ of Summons in Civil Suit No. 255 of 1951 and all subsequent proceedings be set aside for irregularity on the ground that the Writ of of Summons having expired on the 20th December, 1952 should not have been renewed, the claim therein having become barred by limitation prior to that date. The matter was adjourned to Open Court.

In the above-mentioned Civil Suit a Specially Endorsed Writ was issued on the 21st December, 1951; the plaintiff's claim against the defendant is on a Thavanai letter for $3,000 dated the 19th day of Ani Vishu Year (corresponding to the 2nd day of July, 1941) and payable on the 2nd day of October, 1941 to the plaintiff as trustee of the T. AR. CT. Charitable Trust with interest at the rate mentioned on the document. This Writ was served on the defendant on the 15th day of January, 1953, but it had not then been renewed.

On the 16th January, 1953 the defendant entered a conditional appearance, without prejudice to an application to set aside the said Writ and service thereof. Such application was made by way of Summons-in-Chambers on the 17th day of January, 1953; by order made on the 6th day of February, 1953 the service on the 15th day of January, 1953 of a Writ of Summons issued on the 21st December, 1951 was set aside on the grounds that the same was so served after the expiration of twelve months from the day of the date of the said Writ.

On the 30th day of January, 1953 the plaintiff by an *ex parte* application prayed for an Order that the Writ in the said Suit be renewed for a period of six months and that the time for making that application be enlarged. An Order in those terms was made on the 6th day of February, 1953 by Spenser Wilkinson, J. The defendant now claims that that Order was irregular and should be set aside.

Mr. Hume for the defendant firm referred to (S.S.) R.S.C., O. 8, r. 1 (corresponding to the English R.S.C., O. 8 r. 1) and to (S.S.) R.S.C., O. 61, r. 2 (corresponding to the English R.S.C., O. 64, r. 7); he submitted that although the Court has power to renew writs and to enlarge the time this power is not to be exercised where by so doing the law of limitation would be defeated; this submission is supported by a consistent line of authority unbroken till the decision in *Holman v. George Elliot & Co. Ltd.*[1] and this decision was not followed in *Battersby v. Anglo-American Oil Co. Ltd.*[2]; in this case it was laid down that the Court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued; to grant a renewal would be to disregard the statute which no Court has a right to do merely because its operation works hardship in a particular case.

Mr. Hume submitted that the law of limitation applicable to the plaintiff's claim is the Limitation Ordinance (S.S. Cap. 16) — (now replaced by the Limitation Ordinance, 1953 (No. 4 of 1953)) — this was not contested by the plaintiff — and that under this Ordinance the period of limitation applicable to the plaintiff's claim is that of three years as laid down in Article 41 or in Article 42 of the Schedule to that Ordinance. In his affidavit dated the 13th May, 1953, the defendant states that repayment of the loan sued upon was made on the 5th November, 1942 to Annamalai Chettiar, the agent or ostensible agent of the plaintiff, and that on the 26th June, 1948 the plaintiff alleged that the said Annamalai was not the attorney or agent of the plaintiff and that the plaintiff would demand payment of the debt and interest as soon as the Moratorium was lifted. It was submitted for the defendant that even if repayment was not properly made in 1942 and the amount is still due, the period of limitation for claiming repayment begins to run from the date on which the Moratorium Proclamation, 1949 came into force and that is the 1st October, 1949. That being so the plaintiff's claim became barred on the 2nd October, 1952, and at the time the Writ was renewed the plaintiff had no right of action and the statute of limitation was defeated by the Order made on the 6th February, 1953 renewing the Writ.

I may add that Mr. Hume pointed out that there has been neglect on the plaintiff's part in serving the Writ before it expired; he referred to paragraph 2 of the plaintiff's affidavit dated the 22nd January, 1953 where it is stated : "The Writ was issued in December, 1951, but instructions were given to the Sheriff not to proceed immediately with service as I was then awaiting the decision of the Court of Appeal" on a similar issue. Mr. Hume referred to the concluding

paragraph in *Battersby v. Anglo-American Oil Co. Ltd.*[2] (*ubi supra* at p. 32): "In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that the good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development." Mr. Hume submitted that in this case the discretion to renew the Writ should not have been exercised because it is not a good reason that the plaintiff desired to hold up proceedings. I do not consider that I can interfere with the exercise of that discretion; that discretion was exercised by another Judge and I do know the grounds on which the discretion was exercised. In applications to set aside an Order it is the practice that such applications should, wherever possible, (it was not possible in this case) be before the Judge who made the Order to be set aside.

Mr. Meek, for the plaintiff, raised two points :—

(a) that the English authorities on the point in question do not apply in the Settlements because of the provisions of section 3 of the Limitation Ordinance; and

(b) that the period of limitation applicable in respect of the plaintiff's claim is six years.

On the first point the plaintiff's contention is that the effect of the legislation on limitation in England is different from that of the legislation which applies locally. Section 3 of the said Ordinance runs as follows :—

"3. Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed, provided that limitation has been set up as a defence."

The words "provided that limitation has been set up as a defence" have the effect of giving a remedy to the defendant; they do not have the effect of barring the right of the plaintiff. The Court is not bound of its motion to look into the question of limitation and see whether the suit, *prima facie*, has been brought in time; the Court hearing a suit is compelled to dismiss it if the claim is barred only if the defence of limitation is set up; if such defence is not set up the claim will be tried on its merits and there is no duty imposed on the Court to dismiss the suit *motu proprio*.

No authorities were quoted in support of this view.

The Limitation Ordinance of the Straits Settlements was passed in 1896 and came into force on the 1st January, 1897; prior to that Ordinance the law in force in the Straits Settlements was the Indian Limitation Act No. XIV of 1859. The Limitation Ordinance was drawn as closely as possible on the lines of the Indian Limitation Act of 1877 (see Objects and Reasons to the Bill as published in the Straits Settlements Government Gazette of the 8th November, 1895). Clause 4 of that Bill ran as follows :—

"Subject to the provisions contained in sections five to twenty-five (inclusive) every suit instituted after the period of limitation prescribed therefor by the second schedule hereto shall be dismissed although limitation has not been set up as a defence."

Apart from verbal changes this clause is similar to the provision in the Indian Act of 1877. In the Legislative Council, however, the concluding words of the said clause were amended to read as they are now in section 3 of the Ordinance. I have not been able to see the debates of the Legislative Council on this amendment, but it is obvious that the legislature intended to make a fundamental change in the clause.

In the Straits Settlements there was some conflict of opinion on the interpretation of the Indian Act of 1859 as shown by the following extract from a judgment of Leach, J., in *Cheang Cheow Lean Neo v. Low Kim Pong and another*[3] where he said :—

"I am aware that there has been some conflict of authority on the Indian Act XIV of 1859 as to whether it was necessary to set up the defence of limitation or whether the Court should take cognisance of it, if not set up; but the better opinion seems to be that effect should only be given to it if pleaded, and in England it appears to be settled law that unless set up, the Court will enforce the debt — Coombs v. Coombs (4)."

This is not the law in England now, but the old English statutes of limitation barred the remedy only, not the right; the modern ones cut off the right as well as the remedy (See *English and Empire Digest* Vol. XXXII p. 315, para. 5).

In India the position was altered by the Act No. IX of 1871 replacing the Act of 1859; under the latter Act, a party wishing to avail himself of the defence of limitation must plead it; the Court would not take notice of a defence which was not pleaded at some time or other and a party would not be allowed to plead it if the case was tried on its merits and decided against him and then at a late stage in appeal the plea of limitation was set up — see authorities quoted in the *Indian Limitation Act, 1877* by *Starling*, 4th ed., 1900, at pp. 9 and 10. From this it seems clear that the Straits Settlements legislature decided not to follow the principle embodied in the Indian Act of 1877 that is to have a statute of repose and to enable suits to be brought within certain periods or to quote *Story* on the object of statutes of limitation "to discourage litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have now from lapse of time become inexplicable". (*Story's Conflict of Laws*, 8th ed. p. 794).

It is clear from the above that the legislature of the Straits Settlements in enacting the Limitation Ordinance did not intend to follow the principle embodied in the Indian Limitation Act of 1877; it adopted the principle of the old English Statutes and that of the Roman Law and of the modern legislations based on Roman Law (such as France, Italy, Spain) where the *praescriptic* as distinct from *usucapio* is only an *exceptio.*

The only case I could find in support of this view is *Rahman Chetty v. McIntyre & Ors.*[5] decided in 1879 and reported in Kyshe's Reports, 1808 — 1884 Vol. 1 Civil Cases p. 476; there Wood, J., said :—

"I consider that the Statute of Limitations, being a statutable defence somewhat contra bonos mores when applied to mercantile transactions — is a defence pleadable, or not, at the will of the defendant; and does not make a debt ipso facto void."

I agree, therefore, with the submission of Mr. Meek that the English authorities quoted by Mr. Hume on the point in question are not applicable in cases where a suit might be barred by limitation under the Limitation Ordinance (S.S. Cap. 16) because under the Ordinance the Court has no power to dismiss *motu proprio* a suit which is barred. But where the defence of limitation has been set up successfully there is a duty imposed by law to dismiss the suit.

In the present case the Order which the defendant is trying to set aside was made on an *ex parte* application; the defendant had no opportunity of pleading the statute of limitation to the plaintiff's claim. The defendant has now set up that plea in an application made under O. 53 r. 4 to set aside that *ex parte* Order, and it is, in my opinion, within the power of the Court to take cognizance of that plea for the purpose of deciding whether that Order should be set aside.

This brings me to the second point — that is what is the period of limitation applicable to the transaction on which the plaintiff bases his claim. This claim is based on a document known as a Thavanai letter (which was filed by consent during the hearing of this application). The defendant contends that the period of limitation in respect of this document is that of three years, under Article 41 or Article 42 of the Schedule to the Limitation Ordinance; the defendant contends that it is six years under Article 95 of the said Schedule. The following is a translation from Tamil of the document in question :—

"Sign of God
God Siva is Omnipresent.
T. AR. CT.
Penang.

19th day of the month of Ani in the Vishu year. Ramanathan writes:—

Now received from you on this day is ($3,000/-). We have credited this dollars three thousand in the name of T. AR. CT. charity trust fund, through you bearing interest at 5/16 — inclusive of 3/32 excess interest over 3 months Penang "Thavanai" interest. We shall pay the principal and interest according to "Thavanai" to your order at Penang and receive this letter with endorsement of payment.

Signature. SN. S. AR. N. Letchumi Achi
Attorney Ramanathan Chettiar
struck out.

(Reverse)

"Sign of God. God Siva is Omnipresent.

20th day of the month of Arpisi, in the year of Sithrabanu, for this letter up to 18th day of the month of Ani of the current year, excluding the interest received (credited), from the 19th day of the aforesaid month up to the 19th day of the current month, interest for interest, (compound interest) $30.05½ and principal $3,000/-, therefore $3,030.05½, this dollars three thousand and thirty and cents five and a half, had been received by us in cash on the current date (on this day).

(Signed) O. RM. M. SP. SV. Annamalai Chettiar.

Agent for T. AR. CT. Kuppan Chettiar
5.11.2602."

No authorities were quoted to me and I have not found any local authorities on the question of the period of limitation applicable to Thavanai letters. The only local reported cases are : (a) *Letchumanan Chettiar v. Alagappa Chettiar*[6] which decides that the particular Thavanai letter was not a negotiable instrument, and (b) *Sockalingam Chettiar v. Palaniappa Chettiar*[7] which decides that the period of limitation in respect of a claim for a Thavanai deposit is that of three years as laid down in Article 42 of the Schedule to the Limitation Ordinance.

The document in question is a Thavanai transaction common among Natukottai Chetties. Money has been paid by the plaintiff to the defendant and such money is repayable on demand which may be made after a period of three months from the date of payment. The Indian Courts have treated a Thavanai transaction merely as a deposit (See *Mitra* on the *Indian Limitation Act,* XI ed. p. 438, para. 362). The Courts of India have held that where money is deposited for a term and is therefore repayable on demand, the case is covered by Article 60. This Article is not restricted to deposits where the money is payable on demand from the beginning but applies also to cases where the money is payable on demand after the termination of a fixed period. (See *Rustomji* on the *Indian Limitation Act,* 5th ed., pp. 732 — 733).

On these authorities I hold that the Thavanai letter in question is covered by Article 42 of the Schedule to the Limitation Ordinance and that the period of limitation of three years runs from the day on which demand is made, in the present case from the date on

which the Moratorium Proclamation (Repeal) Ordinance came into force and such period expired on the 2nd October, 1952.

In this case the renewal of the Writ and the enlargement of time for renewal will have the effect of depriving the defendant of a statutory defence and applying the principles laid down in *Battersby v. Anglo-American Oil Co. Ltd.*[2] in such circumstances the discretion which the Court has to exercise "is one which can be exercised only in one way if an exercise in the other direction would deprive a party of a legal defence" (at p. 32).

For the above reasons I set aside the Order made on the 6th February, 1933 and the Writ of Summons in this Civil Suit 1951 No. 255 and all subsequent proceedings including the service thereof. Costs (other than costs already taxed and paid) to be taxed and paid by the plaintiff to the defendant.

Judgment for the defendant.

WOK BINTE HUSSEIN v. HARCHAND SINGH

[O. C. J. (Storr, J.) June 11, 1953]

[J. B. — Civil Suit No. 42 of 1951]

Bills of Sale Enactment ss. 3 and 4 — Documents which are not on face of them bills of sale — Court will go behind documents to construe exact nature of documents — Objects of Bills of Sale Acts.

This case raises an important point as to whether the Court can go behind certain documents which on the face of them are not bills of sale and discover from extrinsic evidence the true nature of the documents.

The plaintiff here had executed two documents, one purporting to assign her two movable houses to the defendant and the other giving the plaintiff the right to repurchase the two houses by instalments.

The plaintiff's case was that the documents together amounted to a Bill of Sale and that since they were not in the prescribed form and were not registered the transaction was wholly void. To this Counsel for the defendant submitted that the 1st document amounted to an absolute assignment and that the 2nd document was an agreement to re-purchase by instalment, and that the Court cannot go behind these documents which speak for themselves.

Held, following the judgment of Lord Esher, M.R., in **Madell v. Thomas & Co.**[1]: the main object of the Bill of Sale Enactment is to protect borrowers against lenders and if documents appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, this Court will go through the documents in order to arrive at the truth.

From the evidence adduced as to the circumstances of the transaction, the two documents amount to a Bill of Sale.

Cases referred to:—

(1) *Madell v. Thomas & Co.* (1891) 1 Q.B. 230.

(2) *In re Watson* (1890) 25 Q.B. 27.

(3) *Polsky v. S. & A. Services* (1951) 1 All E.R. 185.

CIVIL SUIT

S. C. MacIntyre for the plaintiff.

A. Muthuswamy for the defendant.

Storr, J.: — This case arose over a transaction between the plaintiff and defendant concerning two movable houses, being Nos. 435 and 436, Jalan Mersing, Kluang, Johore, and standing on land held under Temporary Occupation Licence No. 362/48.

The plaintiff's case was that she borrowed two sums of $100 and $150 from the defendant through his mother-in-law and on asking for the second loan of $150 defendant asked her to give him a document about her two houses. She executed two documents by putting her thumb prints on them. The documents were drawn up by one Othman bin Ghani and were Exhibits P1 and P2.

P2 was an assignment of the two houses to the defendant and P1 was an agreement whereby the plaintiff could re-purchase the two houses by instalments. Both documents mentioned the figure of $512 as the amount passing between the parties, but the plaintiff denied that she received more than the $250.

Mr. MacIntyre, Counsel for the plaintiff, submitted that the documents P1 and P2 together amounted to a Bill of Sale and, as they were not in the prescribed form or registered in accordance with sections 3 and 4 of the Bills of Sale Enactment No. 39 (Johore), the transaction was wholly void and the defendant could get no advantage from the documents, and as he had registered the assignment (P2) with the Town Board, Kluang, and assumed ownership of the houses in the face of continued opposition from the plaintiff, the assignment should be declared void and of no effect, or he should be ordered to re-assign the houses.

The defendant's case was that the transaction was not a loan transaction, but was a sale by the plaintiff to him for $512 as stated in the assignment (P2) and that P1 was only drawn at the request of the plaintiff as an after-thought as she had said she was going to Perak, but if she returned she might like to re-purchase the houses at the same figure she sold them for by 10 instalments of $51.20. She did not re-purchase the houses in accordance with P1 and they were therefore his absolutely.

He further stated that the plaintiff paid him rent for the portion of the house she occupied (this was throughout strenuously denied by the plaintiff) and also he had exercised rights of ownership over the